

5594. Misbranding of "Sulphurro." U. S. * * * v. C. M. C. Stewart Sulphur Co. (Inc.), a corporation. Tried to the court and a jury. Verdict of guilty. Fine, \$150. (F. & D. No. 6366. I. S. No. 6230-e.)

On July 12, 1915, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the C. M. C. Stewart Sulphur Co. (Inc.), a corporation, Seattle, Wash., alleging shipment by said company, in violation of the Food and Drugs Act, as amended, on or about September 14, 1912, from the State of Washington into the State of Nebraska, of a quantity of an article labeled in part, "Sulphurro," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Total solids by drying (grams per 100 cc)-----	8.87
Ash (grams per 100 cc)-----	6.54
Calcium (grams per 100 cc)-----	1.428
Sulphur (grams per 100 cc)-----	4.212
Potassium salts: None detected.	
Test for sodium chlorid: Positive.	

It was alleged in substance in the information that the article was misbranded for the reason that certain statements appearing on the label falsely and fraudulently represented it as a remedy for rheumatism, asthma, goiter, eczema, and all stomach, bowel, kidney, skin, and blood diseases, when, in truth and in fact, it was not. Misbranding was alleged in substance for the further reason that certain statements included in the booklet accompanying the article represented it as effective in the treatment of diabetes when used according to directions, when, in truth and in fact, it was not, when used according to directions or when used in any other manner.

On October 12, 1915, the case came on for trial before the court and a jury, and, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court (Neterer, D. J.):

In this case, members of the jury, you are not concerned about the wisdom of this act of Congress. The act is passed and you are not concerned with that other than to determine what the fact is with relation to this particular case. You are only concerned with the facts in this case and you must determine what the facts are with relation to the issue which is formed by the information filed and the plea entered by the defendant. You are to approach the issue with open minds, and consider all of the evidence which has been presented fairly and not to be concluded with relation to any fact by reason of any sympathy or prejudice of any kind, but are simply to pass upon this issue fairly and impartially as twelve honest persons, and determine what the real truth is with relation to the issue here, and what the facts in this case really establish, by the witnesses who have testified.

The issue is not a complex one. The information is rather lengthy, and I will not read it. You can read that when you go to your jury room. In substance, it charges the defendant company with having violated this drug act which prohibits the false branding of any drug so that it may mislead persons to believe a different thing is contained in it than the facts really justify, or to lead to conclusions with relation to certain properties which it does not contain, which branding is made knowing it to be false and made for the fraudulent purpose of misleading persons who might read this label.

The defendant has entered a plea of not guilty to this indictment and that places in issue every material allegation in the indictment, and the burden of proof is upon the government to establish each material allegation beyond every reasonable doubt.

It has been stipulated that the drugs charged in the indictment to have been shipped from this state to Nebraska in interstate commerce were shipped, so that you are not concerned with that. I think about the only issue you

have to determine is whether this drug was misbranded, and whether these statements are falsely and fraudulently made as charged in the information. These terms all have their common meaning. There is no technical meaning applied to the terms used, and therefore it is not necessary for me to define what the word "false" is intended to mean, or what "fraudulently" is intended to mean. It simply means exactly what the terms imply and which you all must know.

The information, as I have stated, charges misbranding of this drug called Sulphurro. The test of this branding is what the statements appearing on the label means to the ordinary man. In other words, what the ordinary man reading the label would understand as to the properties of the drug Sulphurro and what curative effects it had. And if you are convinced by the evidence in this case that there was not anything there to mislead any person, then the further question as to whether Sulphurro can or will cure the diseases for which it is branded to cure and for which parties have purchased it, must be determined. In this case a number of witnesses have testified; on the part of the Government some medical experts testified with relation to the effect of certain drugs on the human system, and certain properties contained in such drugs. On the part of the defense, some thirty-five of thirty-six witnesses have testified with relation to the curative effects which have resulted to them individually from the use of this drug. I do not think that any witness for the government testified that they purchased this for a certain purpose or for certain curative effects and did not obtain them. The testimony of the government is confined to the medical experts.

In weighing the evidence in this case, you will take into consideration all of the facts and all of the circumstances surrounding these several witnesses. The mere fact that a witness states a conclusion, that don't necessarily bind you to that conclusion, unless you are convinced from the evidence offered and admitted, taking into consideration the surroundings and environment of the witnesses who have testified and the facts upon which the conclusion is based; and you will take into consideration all of those things and then will make your deductions from all of these facts. Some witnesses have testified here who are termed expert witnesses. The mere fact that they have testified to conclusions with relation to what they believe to be the fact, is not conclusive upon you. While their testimony has persuasive effect and should be considered by you with relation to all the facts and circumstances detailed by the witnesses, yet their conclusions must be based upon facts disclosed by the evidence which would justify the conclusions, and you will take into consideration all of these facts and determine whether the conclusion is justified upon the facts upon which they are predicated. With relation to other witnesses testifying, who are not experts, but who have testified with relation to certain curative effects which they have received from the use of this drug, you will take into consideration their testimony as to their ailments and what effect the drug had upon them and what curative effects they experienced by using it, and if you should find from the evidence in this case, or if you have a reasonable doubt upon that question as to whether the parties who used this drug received the curative effects or some remedial effect, as claimed upon the label found upon the bottle and likewise the printed matter that was enclosed with this drug as it was sent in interstate commerce, then, I say, if you believe from all of these facts that it did have the curative effect or they did get the remedial effect which these labels and literature showed, then of course you will find the defendant not guilty in this case. But if you find, beyond a reasonable doubt, from all of the evidence which has been offered and admitted, that this label is false and that the literature which was enclosed with this which portrayed the curative effects which this medicine would have was false, and the statements contained therein made for the false and fraudulent purpose of inducing persons to buy this drug, then of course you would find the defendant in this case guilty as charged in this indictment.

The defendant is presumed to be innocent until proven guilty by the evidence which has been offered and admitted, and this presumption continues throughout the entire trial; and you will resolve any reasonable doubt that you may have in this case with relation to any fact which is in issue here in favor of the defendant.

It isn't necessary that the Government prove that every statement with relation to the curative effect of each ailment made upon the label is false. If the Government has established any of these statements to be false and fraudulent and made for the purpose of fraudulently misleading the public, that would be sufficient.

You will take all of the evidence into consideration which has been offered and admitted, and conclude with relation to the fact as I have indicated a moment ago as twelve fair minds with an honest purpose of arriving at a just conclusion so that justice may be done between the government and this defendant.

A reasonable doubt for your consideration in this evidence is such a doubt as an ordinarily reasonable man would entertain in considering any matter of like concern or import to him as that before the jury is to the defendant, and which would make him pause or hesitate in arriving at his determination and conclusion. It is a doubt for which you can give a reason. It is not merely speculative, imaginary or conjectural. If a juror can say that he has an honest conviction of the proof of the charge, then of course he would be convinced beyond a reasonable doubt. If he can say to himself that he feels to a moral certainty that the fact is established, then he is satisfied beyond a reasonable doubt. But if you can not say that, then of course he has a reasonable doubt which he must resolve in favor of the defendant.

By the COURT. Are there any omissions or exceptions?

By Mr. FRYE. We have none, Your Honor.

By the GOVERNMENT. We have no exceptions.

By the COURT to the jury. It will require your entire number to agree upon a verdict in this case. Two forms will be submitted. If you believe that the charge has been established beyond a reasonable doubt, this will be your verdict:

"We, the jury in the above entitled cause, find the defendant guilty of a violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act, as charged in the indictment."

And if you have a reasonable doubt, this will be your verdict:

"We, the jury in the above-entitled cause, find the defendant not guilty."

Whichever verdict you find you will cause to be signed by your foreman, whom you will elect immediately upon retiring to the jury room.

This information will be sent with you to the jury room, but it is not to be considered as evidence in the case, but is simply a paper charge to which the defendant has entered a plea of not guilty.

You may swear the bailiffs.

The jury thereupon retired; and after due deliberations returned into court, and the foreman announced that they were unable to agree upon a verdict; and the jury was discharged. On October 19, 1915, the case came on for retrial, and after the submission of evidence and argument by counsel the following charge was delivered to the jury by the court (Neterer, D. J.):

In this case, Gentlemen of the Jury, you have been accepted by both sides as twelve fair minded men, unprejudiced, without any preconceived notion as to what the facts in this case are to determine the issue which is submitted. You have a distinct duty and function to perform in this case as a part of the machinery of the Government, as have also the attorneys in this case, for the United States, and for the defense, in that it is their duty to present the facts of their respective sides before you in a fair and full manner so that you may get a viewpoint from both sides; and your duty is to pass upon the facts as presented. That is your sole province and nobody can tell you what the facts are in this case, but this you must determine from the evidence offered and admitted. The duty of the Presiding Judge is to see that the case is fairly tried, exclude immaterial matters, and see that the case is orderly conducted, and advise you upon the questions of law applicable to the facts presented before you for your consideration. You are a part of the machinery of the Government here. The laws must be enforced and persons against whom complaints are made by the officers of the law must be given a fair trial; so you can very readily understand the importance of the functions you perform in this proceeding. You are the sole judges of the facts in this case. I can't tell you what a single fact is, and if I should refer to any fact, it is your duty to disregard it. It is not my purpose to impress upon you any opinion that I may have of any fact. You are the sole arbiters of the facts and must determine what the facts are upon the issue presented by the information filed in this case by the United States District Attorney and the plea of not guilty which has been entered by the defendant.

The issue is not a complex one, and it is made, as I have stated, by the information which has been filed by the United States District Attorney, and

the defendant's plea of not guilty. The plea of not guilty places in issue every material allegation in the information. In other words, it is a denial. By plea of not guilty the defendant denies all of the allegations in the information, and that places upon the Government the burden to prove every material allegation in the information beyond a reasonable doubt. This information you may take with you to the jury room when you retire. You may read it and see just what the charge is, but it is not to be considered as evidence in the case in any sense. The information is entirely too long for me to read to you now and I will leave that to you.

While the burden of proof is upon the Government to establish every material allegation of the information beyond a reasonable doubt, you understand, of course, that when admissions are made upon the trial by the defendant as to the truthfulness of a statement, no proof need be offered with regard to such admission or the fact that has been admitted. It has been admitted on behalf of the defendant that the drugs which are set out in the information were shipped from this State to the place named in the information, and were shipped in interstate commerce, so that no proof need be offered upon that allegation; and I think it has been admitted, if not formally, upon the argument, that Mr. Stewart is the agent of the defendant company, and likewise that the defendant company is a corporation. You will understand that corporations can only act through their agents and representatives, and that any representations made or any act done with relation to the charge in this information by Mr. Stewart is the act of the defendant corporation.

The only issue of fact in controversy in this case to be determined by you is whether the drug described in the information was misbranded. The test of this misbranding is what the statements appearing upon the label mean to the ordinary man, and when I refer to the label I mean likewise the circular or pamphlet which was enclosed in the package as it was transmitted in interstate commerce. In other words, what the ordinary man reading the label would understand as to what properties the drug Sulphuro contained or the curative or therapeutic effects it had. I will not attempt to define or set out the various ailments or physical disabilities which it is claimed the statements contained that this drug would cure, but these diseases or physical ailments you will understand to be such diseases or ailments as the public generally understood and the generally accepted meaning of these drugs by the public, and you are not confined in your deliberations in applying to these diseases the technical medical definition or term which has been scientifically limited by some of the witnesses. I have indicated the generally accepted understanding of the public as to what these terms mean and what physical disabilities they include, and you will apply the curative or therapeutic effect of the drug to the definition as generally understood. And you will also understand that it is not only necessary for the Government to show beyond every reasonable doubt that the statements that were made were false in fact and that the drugs did not have the curative or therapeutic effects that the statements attributed to them, but the Government must further prove beyond a reasonable doubt that the statements are fraudulent and that the defendant knew them to be false, and that they were falsely made with the intent to deceive the public or induce the purchaser to buy them because of such statements. And if you believe that the statements were false and the defendant knew they were false and made them with the intent to deceive the purchaser, or if, acting as an ordinary prudent man would act under like circumstances, he should have known, that the statements were false, then you will find that the statements were falsely made as charged in the indictment, and under such circumstances your verdict should be guilty. On the other hand, if you have a reasonable doubt as to whether the statements were false or whether they were fraudulently made, then it would be your duty to acquit the defendant. So that the mere falsity of the statements would not be sufficient to justify you in returning a verdict of guilty, but in addition to that it requires the further proof that the defendant made them knowingly and with intent to deceive and defraud.

I hardly think it is necessary for me to enter into any definition of these various terms, but suffice it to say that a fraudulent statement is a statement which is recklessly made without knowledge of its truth, but which is really false, and an unqualified statement of that which one does not know to be true, or has no reasonable ground to believe to be true, is equivalent to a statement of that which one knows to be false.

In determining whether the defendant knew the statements were false and fraudulently made, you will take into consideration all of the evidence which was offered and admitted surrounding the placing of this drug upon the market,

which led to placing it in interstate commerce as charged in the information, and you will consider all of the testimony with regard to these statements that is before you from the inception, dealing or treating with this drug up to the time of the filing of this information, the date of which you will find endorsed upon the cover of the information, and from all of these statements as disclosed by the evidence bearing on the conduct of the defendant with relation to this drug, determine whether it acted as an honest, fair minded, average man would act under like circumstances, and whether it had reason to believe, acting as a reasonably prudent man would act under such circumstances, that this drug did contain the curative or therapeutic effects which are attributed to it in the statements, and when I say it, referring to the defendant, I mean Mr. Stewart, who seems to have had the management and control of the concern.

In this case some eight physicians have testified, among whom are some specialists, as you will remember, as well as a chemist or analyst, who has testified with relation to the ingredients of the drug in question. The testimony of the Government is all confined to expert medical evidence, except the testimony of the chemist or analyst. They have testified with relation to the several ingredients contained in this drug as disclosed by the evidence and the curative effect of the drugs separately and likewise the therapeutic effect of the drugs taken together, based upon their experience as practitioners and likewise upon their reading in medical journals and treatises by eminent doctors. The defendant has presented to you some thirty-five or thirty-six persons who have testified that they have been treated by this drug Sulphuro and have been cured of various ailments. Some of them say they have been afflicted for years and have recovered, so they say, their health entirely, and have stated to you what they understand that they were afflicted with. You will weigh all of the evidence which has been presented here. It is not my purpose, nor do I intend to enter into an analysis of the testimony, or give you a synopsis of my recollection of the evidence. The evidence has all been reviewed by counsel for the Government and the defendant. They have given you their version of the testimony and the conclusions that should be drawn from the testimony of the witnesses, and while you are not bound by the statements or the recollection of the attorneys for the respective parties, you should give these statements and their version of the testimony consideration. Nor are you bound by the conclusions of the witnesses upon the testimony which has been offered and admitted upon either side. You will weigh the evidence in this case very carefully. You are the sole judges of the facts in this case and the weight that should be accorded to the testimony, and you must determine what that is. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or credit which you desire to give to the testimony of any witness, you will take into consideration the demeanor of the witness upon the witness stand; the opportunity of the witness for knowing the things concerning which he has testified; the interest or lack of interest of the various witnesses in the result of this controversy; the apparent frankness or truthfulness of the witnesses; the reasonableness of the stories of the witnesses who have testified, and from all of these determine which of the witnesses impressed you the more strongly of telling the truth. In considering the conclusions of the witnesses, both the medical experts and likewise the witnesses on the part of the defendant, with relation to the therapeutic effect of the medicine or with relation to the illness with which the witnesses on the part of the defendant claimed to be afflicted, you will determine whether the conclusions are based upon facts which have been disclosed by the evidence as you understand it, and as it is conveyed to you, and the truthfulness of the conditions as portrayed by the witnesses, and while these conclusions are perhaps somewhat persuasive and should be considered by you, yet the facts upon which they are based should be closely scrutinized by you, and determine whether they are true and justified from all of the circumstances developed upon this trial, and apply to each witness who has testified before you the same test you would apply to any person in the ordinary affairs of life the truthfulness or falsity of whose statements might be under consideration by you, and determine the credit or the weight that should be given to the statements that have been made upon this trial.

The defendant, under the plea of not guilty, is presumed to be innocent until proven guilty beyond a reasonable doubt, and this presumption continues throughout the entire trial and until you are convinced from the evidence beyond every reasonable doubt of its guilt. And in this connection, I would say that a reasonable doubt for a trial juror is just such a doubt as the word

implies. It is a doubt for which you can give a reason. When a juror can say to himself that he is convinced to a moral certainty of the guilt of the defendant, then he would be convinced beyond a reasonable doubt. It is not a doubt which is speculative, imaginary, or conjectural, but is such a doubt as a man of ordinary prudence, sensibility, and decision would have in determining an issue of like concern to himself as that before the jury is to the defendant, which would make him pause or hesitate in arriving at his conclusion.

In this case, while the Government must prove beyond every reasonable doubt the material allegations of the information, this need not be done with relation to every disease which is named upon this label or in the statement which is included within this package as it was transmitted in interstate commerce. If you believe from the evidence that this drug has many curative qualities and will cure many of the diseases which are named on the label or the package, but will not cure others, and believe beyond a reasonable doubt that there are some ailments named upon the label or the literature or statement enclosed with the package, as charged in the information, concerning which the statements were false and known to be false at the time they were made, and were made for the fraudulent purpose as charged in the information—if you are so convinced beyond a reasonable doubt of the falsity of the statements with relation to one of the diseases, then it would be sufficient to support a verdict of guilty, and if you are so convinced, your duty would be to return a verdict of guilty. But if you have a reasonable doubt as to all of these, then your duty would be to return a verdict of not guilty.

You will approach the issue in this case as twelve fair minded men, eliminating from your minds any prejudice that may be there and dispose of this case upon the evidence presented and not be influenced by sentiment or prejudice of any kind or character.

I think I should say in these instructions that this case was tried before during this term before another jury, and you undoubtedly have learned in some way that the other jurors did not agree. I think I should say that in this case additional witnesses have been presented on the part of the Government and likewise on the part of the defendant, and there is evidence before you that was not before the other jury. You are not concerned as to what the other jury did. It is your duty in this case as twelve reasonable men who have been empanelled to try this issue, to honestly endeavor to reach a conclusion. When you go to the jury room you will undoubtedly approach this issue from twelve different viewpoints. You can not come to any conclusion by continuing to have twelve different viewpoints. You must discuss the issue here from every standpoint from which it can be approached and harmonize the facts in this case as disclosed by the evidence and by an analysis of the evidence, eliminate that which can have no bearing upon the issue, and apply that which is material, and in that way harmonize all of the testimony so that you may ultimately come to a conclusion where you all see this in the same light. No juror should surrender any conscientious conviction which he may have as to any fact established by the evidence in this case, but before he concludes with relation to that conviction and is convinced that he is right, he should approach the subject from the viewpoint of each of the other jurors who may differ with him, and see whether your conclusions cannot be harmonized. I do not know that these instructions are necessary, but in view of the fact that this case was recently tried and perhaps some information reached you as to the other trial, I thought possibly that I should instruct you upon that phase, so that you might not be influenced thereby. You will therefore entirely disregard what the other jury did and not consider it in any way.

By the COURT. Have I covered the whole subject, or are there any omissions or exceptions.

By COUNSEL FOR THE GOVERNMENT. No exceptions, Your Honor.

By COUNSEL FOR THE DEFENSE. We have no exceptions.

By the COURT to the jury. It will require your entire number to agree upon a verdict. Immediately upon retiring to the jury room you will elect one of your number foreman. Two forms of verdict will be submitted; one will be finding the defendant not guilty, and the other guilty. These forms of verdict speak for themselves, and when you have concluded, you will cause your verdict to be signed by your foreman and report to the court.

You may swear the bailiffs.

The jury thereupon retired and after due deliberation returned a verdict of guilty, and a fine of \$150 was imposed.

C. F. MARVIN, *Acting Secretary of Agriculture.*